

United States
Circuit Court of Appeals
For the Ninth Circuit

C. A. RASMUSSEN, as Collector of Internal Revenue
for the District of Montana,
Appellant,
vs.
EDDY'S STEAM BAKERY, INC., a Corporation,
Appellee.

Petition for Writ of Certiorari
for Diminution of Record

T. B. WEIR
HARRY P. BENNETT
Attorneys for Appellee.

Filed.....**FILED**....., 1931.

JAN - 4 1932

.....
PAUL P. O'BRIEN,

CLERK

.....Clerk.

NO. 6537

United States
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C. A. RASMUSSEN, as Collector of Internal Revenue
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Comes now the Appellee, Eddy's Steam Bakery, Inc.,
a corporation, and petitions and shows:

I.

That by Assignment of Error No. V herein the
Appellant specifies as error that the evidence is in-
sufficient to support the findings and conclusions of
the District Court.

II.

That attached hereto are respectively copy of a contract between Louis Stadler and Louis Kaufman on the one part and J. E. O'Connell and E. H. Gallivan on the other part, which said contract is marked Plaintiff's Exhibit 2, and a copy of a deed in which said Stadler and Kaufman are of the one part and J. E. O'Connell is of the other part, which said deed is marked Plaintiff's Exhibit 3. That said documents are the same documents referred to in the printed record at pages 48 and 49 thereof as "Defendant's 2 and 3" and Exhibit 2 and Exhibit 3, respectively.

III.

That said documents, and each thereof, were offered and received in evidence upon the trial of this cause.

IV.

That said documents are in effect by said reference in said transcript and bill of exceptions made a part of the said bill of exceptions as settled in this cause.

V.

That by inadvertence and mistake said documents were not printed in the record of this cause as a part of the bill of exceptions, nor were they certified up to this Court as original exhibits.

VI.

That in the preparation of the record on appeal, Attorneys for Appellant presented to T. B. Weir, as Attorney for the Appellee herein, a stipulation for the submission of Exhibits numbers 5 to 10, inclusive, to this Court as original exhibits, according to the reference made at page 87 of the Transcript herein and to the order of Court of July 2, 1931. That Appellee's said attorney, at the time of signing said stipulation, understood from conversation with attorney for Appellant that all other original exhibits referred to in the bill of exceptions, with the exception of said numbers 5 to 10, both inclusive, would be included in the printed record.

That Appellee relied on such impressions, and because part of the original exhibits had been certified as original exhibits to this Court, at the time the printed transcript was served on Appellee the Appellee mistakenly assumed that all original exhibits, as such, had been certified to this Court as part of the original record.

VII.

That Appellee has just this day discovered that plaintiff's said Exhibits 2 and 3 had not been certified up as a part of the original records in this case and are not contained in the printed record.

VIII.

That said exhibits are necessary to a consideration of said Specification of Error No. 5 and should be included as a part of the record in the cause.

WHEREFORE, Petitioner prays that Writ of Certiorari, or other appropriate Writ, be granted by this Court for a diminution of the record in this cause to include said documents, Plaintiff's Exhibits 2 and 3, respectively, as a part of the record on appeal herein.

EDDY'S STEAM BAKERY, INC., Appellee,
By T. B. WEIR
Its Attorney.

State of Montana, County of Lewis and Clark—ss.

T. B. Weir, being first duly sworn, deposes and says: That he is one of the Attorneys for the Appellee, Eddy's Steam Bakery, Inc., in the foregoing cause; that he has read the foregoing petition and knows the contents thereof, and the matters and things therein stated are true of his own knowledge.

T. B. WEIR.

Subscribed and sworn to before me this 29th day of December, 1931.

(Notarial Seal)

JOHN J. MITCHKE,
Notary Public for the State of Montana, Residing at
Helena, Montana. My Commission expires May
1st, 1933.

NOTICE

TO C. A. RASMUSSEN, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MONTANA, APPELLANT HEREIN, AND TO WELLINGTON D. RANKIN AND ARTHUR P. ACHER, ATTORNEYS FOR APPELLANT:

You, and each of you, will please take notice, that the foregoing petition will be presented to the above entitled Court at the Court Room thereof in the City of San Francisco, California, at the opening of Court on Tuesday the 5th day of January, 1932, or as soon thereafter as counsel may be heard.

Dated December 29th, 1931.

T. B. WEIR,
HARRY P. BENNETT,
Attorneys for Appellee.

ACCEPTANCE OF SERVICE

Due personal service of the foregoing petition and notice admitted and receipt of copies acknowledged this day of December, 1931.

Attorneys for Appellant.

Filed July 16, 1930.

C. R. Garlow, Clerk.

PLAINTIFF'S EXHIBIT TWO

THIS AGREEMENT, Made and entered into this twenty-fifth day of April, A. D. 1917, between LOUIS STADLER, GUSSIE STADLER, his wife, and LOUIS E. KAUFMAN, unmarried, of the City of Helena, in the County of Lewis and Clark, State of Montana, the parties of the first part, and EDWARD H. GALLIVAN and JAMES EDMUND O'CONNELL, of the same place, the parties of the second part, WITNESSES: That the said parties of the first part, in consideration of the covenants and agreements on the part of the said parties of the second part, hereinafter contained, agree to sell unto the said parties of the second part, all those certain lots, pieces or parcels of land situate, lying and being in the Townsite of the City of Helena, County of Lewis and Clark, State of Montana, particularly described as follows, to-wit:

Lots numbered Three (3) and Four (4) in Block number Thirty (30); also Lot number Forty-nine (49) in said block, excepting the West 20.7 feet thereof conveyed by deed to Charles J. Geier, said deed bearing date the 14th day of April, 1909, and recorded in the office of the County Clerk and Recorder of said County of Lewis and Clark on the 15th day of April,

1909, in Volume 59 of Deeds, page 509; also all that portion of Lots numbered Forty-seven (47) and Sixty (60) in said block, particularly described as follows: Beginning at a point in the North line of said Lot number Forty-nine (49) in said block, 42.3 feet West-erly from the Northeast corner of said Lot number Forty-nine (49); thence running Northerly 4 feet to a point; thence Easterly parallel to the said North line of said Lot number Forty-nine (49), 42.3 feet; thence Southerly 4 feet to the Northeast corner of said Lot number Forty-nine (49), the place of beginning; said lots and block being as numbered, designated and de-scribed on the McIntrye plat of said townsite on file in the office of said County Clerk and Recorder. This agreement is expressly made subject to that certain party wall agreement bearing date the 13th day of May, 1907, made and entered into between Louis Stadler, Mary Stadler, his wife, and Louis E. Kauf-man, of the one part, and Mary Edwards of the other part.

The purchase price for said property is the sum of sixteen thousand dollars (\$16,000.00), lawful money of the United States of America.

And the said parties of the second part, in consid-eration of the premises, agree to pay in lawful money of the United States of America, to the said parties of the first part, the said sum of sixteen thousand dollars (\$16,000.00) in the instalments following, that is to say: the sum of four thousand dollars (\$4000.00) cash

at or before the execution of this agreement, the receipt of which is hereby acknowledged; the sum of two thousand dollars (\$2000.00) on or before the first day of May, 1918, and the sum of two thousand dollars (\$2000.00) on or before the first day of May in each year thereafter until the said purchase price shall be fully paid, together with interest on said deferred payments at the rate of six per cent. per annum from May 1st, 1917, until paid, interest payable annually on May 1st in each year.

And the said parties of the second part agree to pay all state, county and city taxes and assessments of whatever nature which may become due upon the premises above described for the year 1917 and each year thereafter.

The said parties of the second part further agree to keep the improvements upon said premises insured against loss by fire in the sum of at least eight thousand six hundred and fifty dollars (\$8650.00) in favor of the said parties of the first part as their interests may appear.

It is further understood and agreed that the said Louis Stadler and Louis E. Kaufman may occupy and retain the use, without charge, of that certain office now occupied by them in the building upon said premises until the deed hereinafter mentioned shall be delivered under the terms of this agreement.

The said parties of the first part will, contemporaneously with the execution of this agreement, make,

sign and acknowledge a good and sufficient deed, for the conveying and assuring to the said parties of the second part the fee simple of the said premises, with usual covenants of warranty and free from encumbrance, which said deed shall be deposited, together with a duplicate original of this agreement, in escrow with the AMERICAN NATIONAL BANK of Helena, Montana, to be delivered to the said parties of the second part if they shall make payment of said purchase prices in the instalments and within the time and with the interest hereinabove specified, and shall in all respects comply with the terms of this agreement on their part. In case of default in the payment of any instalment of said purchase price, or of the interest to become due thereon, within the time in that behalf hereinabove specified, such default continuing for the space of six months, the said depository shall return the said deed to the said parties of the first part, or their order, and the parties of the second part shall not thereafter have any right to purchase said property, or any part thereof, anything herein to the contrary notwithstanding, and this agreement shall constitute the instructions to said depository as to the disposition of said deed in escrow.

And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties and that the said parties of the second part are to have posses-

sion of said described premises on or before the first day of May, 1917.

It is further understood and agreed that time is of the essence of this agreement, and that in the event of a failure to comply with the terms hereof, by the said parties of the second part, such failure continuing for a period of six months, the said parties of the first part shall be released from all obligation in law or equity to convey said property, or any part thereof, and said parties of the second part shall forfeit all right thereto and shall also forfeit as rent and as fixed, settled and liquidated damages, all sums of money paid by them under the terms of this agreement prior to such failure.

It is further understood and agreed between the parties to these presents, that if default be made in fulfilling this agreement, or any part thereof, on the part of the said parties of the second part, such default continuing for a period of six months, then and in such event the said parties of the first part, their heirs, executors, administrators or assigns, shall have the right to the immediate possession of said premises and each and every part and parcel thereof, and shall have full and ample right to proceed against the said parties of the second part and to remove them therefrom in the manner provided by law for the removal of persons forcibly entering into the possession of and unlawfully detaining any lands or other possessions.

IN WITNESS WHEREOF, the said parties have hereunto set their hands, the day and year herein first above written.

Louis Stadler

Gussie Stadler

Louis E. Kaufman

Edward H. Gallivan

James Edmund O'Connell

(on back)

\$2000.00 Prin \$720.00 Interest pd May 1-1918

\$2000 Prin \$115.00 Interest pd April 14-1919

Paid S & K \$480.00 Interest pd 5/7/1919 to May 1 1919

2000 Prin \$12.00 Interest pd 5/9/1919

Int paid May 3rd 1920 \$360.00

Int paid May 6th 1921 360.00

\$2000.00 Prin paid Sept 20th 1921

46.66 Int on \$2000.00 May 1st 1921 to Sept 20 1921 leaving 1 year interest to be paid on \$4000.00 from 5/1/21 to 5/1/22

Int. paid May 6th 1922—\$240.00

\$2000.00 Prin paid Jan. 15th 1923

\$85.00 Int. paid on \$2000.00 to Jan. 15th 1923

Balance due \$2000.00 on principal and interest on same from May 1st-1922 to—

\$2000.00 Prin paid May 4th 1923

\$121.00 int paid May 4th 1923

(Indorsed on cover)

A G R E E M E N T

LOUIS STADLER, et al.,

with

EDWARD H. GALLIVAN, et al.

Dated April 25th, 1917

J. MILLER SMITH, Attorney.

Helena, Montana.

PLAINTIFF'S EXHIBIT THREE

Filed July 16, 1930.

C. R. Garlow, Clerk.

THIS INDENTURE MADE the 7th day of May, A. D. one thousand nine hundred and twenty-three, between LOUIS STADLER, GUSSIE STADLER, his wife, and LOUIS E. KAUFMAN (unmarried), of the City of Helena, County of Lewis and Clark, State of Montana, the parties of the first part, and JAMES EDMUND O'CONNELL, of the same place, the party of the second part, WITNESSETH: That the said parties of the first part, for and in consideration of the sum of Ten Dollars (\$10.00), lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell, convey, warrant and confirm unto the said party of the second part, and to his heirs and assigns, forever, the hereinafter described real estate situated in the Townsite of the City of Helena, County of Lewis and Clark, State of Montana, to-wit:

Lots numbered Three (3) and Four (4), in Block number Thirty (30); also Lot number Forty-nine (49) in said Block, excepting the west 20.7 feet thereof conveyed by deed to Charles J. Geier, said deed bearing date the 14th day of April, 1909, and recorded in the office of the County Clerk and Recorder of said County of Lewis and Clark on the 15th day of April,

1909, in Volume 59 of Deeds, page 509; also all that portion of Lots numbered Forty-seven (47) and Sixty (60) in said Block, particularly described as follows: Beginning at a point in the North line of said Lot number Forty-nine (49) in said Block, 42.3 feet westerly from the Northeast corner of said Lot number Forty-nine (49); thence running Northerly 4 feet to a point; thence Easterly parallel to the said North line of said Lot number Forty-nine (49), 42.3 feet; thence Southerly 4 feet to the Northeast corner of said Lot number Forty-nine (49), the place of beginning; said lots and block being as numbered, designated and described on the McIntyre plat of said townsite, on file in the office of the County Clerk and Recorder.

Also all the right, title and interest of the grantors in and to the party wall agreement, bearing date the 13th day of May, 1907, made and entered into between Louis Stadler, Mary Stadler, his then wife, and Louis E. Kaufman and Mary Edwards, together with any burdens of such agreement as well as the privileges appertaining thereto. This conveyance is also made subject to all State, County and City taxes and assessments levied against the premises, beginning with the year 1917, and which said assessments, levies, etc., the said party of the second part hereto assumes.

Together with all and singular the hereinbefore described premises together with all tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and rever-

sions, remainder and remainders, rents, issues and profits thereof; and also all the estate, right, title, interest, right of dower and right of homestead, possession, claim and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in and to the said premises, and every part and parcel thereof, together with the appurtenances thereto belonging, to have and to hold all and singular the above mentioned and described premises unto the said party of the second part, and to his heirs and assigns, forever.

And the said parties of the first part and their heirs do hereby covenant that they will forever warrant and defend all right, title and interest in and to the said premises and the quiet and peaceable possession thereof, unto the said party of the second part, his heirs and assigns, against all acts and deeds of the said parties of the first part, and all and every person and persons whomsoever lawfully claiming or to claim the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first hereinbefore written.

Louis Stadler (SEAL)

Gussie Stadler (SEAL)

Louis E. Kaufman (SEAL)

Signed, Sealed and Delivered in the presence of
Annie M. Stewart

(Here are pasted six (6) Documentary Stamps in sum of \$2.00 each)

State of Montana, County of Lewis and Clark—ss.

On this 7th day of May, in the year nineteen hundred and twenty-three, before me, Annie M. Stewart, a Notary Public for the State of Montana, personally appeared Louis Stadler, Gussie Stadler and Louis E. Kaufman (unmarried), known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

Annie M. Stewart,
Notary Public for the State of Montana. Residing at
Helena, Montana. My commission expires Dec. 17,
1923.

(Notarial Seal)

(Indorsed on back)

12017

WARRANTY DEED.

FROM

LOUIS STADLER, et al.,

TO

J. E. O'CONNELL.

Dated May 7, 1923.

State of Montana, County of Lewis and Clark—ss.

I hereby certify that the within instrument was filed in my office on the 8th day of May A. D. 1923 at

35 min. past 4 o'clock P. M. and recorded on page 419 of book 94 of Deeds Record of Lewis and Clark County, State of Montana.

A. J. Duncan

County Recorder.

By A. H. Cooney

Deputy.

J. E. O'Connell

Eddy Bakery.

United States of America, District of Montana—ss.

I, C. R. GARLOW, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the annexed and foregoing is a true and full copy of the original PLAINTIFF'S EXHIBIT NO. 2 and PLAINTIFF'S EXHIBIT NO. 3, in case No. 1399, Eddy's Steam Bakery, Inc. etc. vs. C. A. Rasmusson, as Collector of Internal Revenue for the District of Montana, now remaining among the records of the said Court in my office. *Said Exhibits contain 20 pages both*

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Helena, Montana, this 30th day of December, A. D. 1931.

C. R. GARLOW,
Clerk.

By H. L. ALLEN

Deputy Clerk.

(SEAL)